

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RUDAFORD STERRETT,

Plaintiff-Appellant,

v

LARRY A THEISEN and SANDRA THEISEN,

Defendants/Cross-plaintiffs-  
Appellees,

and

RUDY D. KEY and REMAX HOME  
PROFESSIONALS, INC,

Defendants/Cross-defendants-  
Appellees.

UNPUBLISHED

September 20, 2005

No. 262226

Clinton Circuit Court

LC No. 04-9705-CZ

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Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition in favor of defendants in his action for misrepresentation, breach of contract, and violation of the Consumer Protection Act in the sale of real property. We affirm.

I

Plaintiff bought a house and some adjoining real property in a rural area of Clinton County from defendants Larry and Sandra Theisen (Theisens). Defendant Rudy Key (Key), working as an independent contractor for defendant Remax Home Professionals, Inc. (Remax), served as the sellers' agent in the sale of the real estate. The Theisens indicated on the Seller's Disclosure Statement that they were not aware of any encroachments, easements, zoning violations, or non-conforming uses or of settling, flooding, drainage, structural, or grading problems on the property. Key, likewise, stated that he had no knowledge of any flooding or drainage problems on the property, and he denies making any representation to plaintiff concerning flooding, drainage, or grading.

Key stated that, in the spring of 2003 after hearing some concerns from another potential buyer regarding an easement through the property, he contacted the title insurer and requested that they further research the title. The Commitment for Title Insurance, which was provided to plaintiff prior to the closing, stated: "Although an Easement has not been found in the Register of Deeds, an Easement for Drain purposes vested in the Clinton County Drain Office has been disclosed to this Company."

The buy and sell agreement between plaintiff and the Theisens states,

BUYER acknowledges that is has been recommended that an attorney be retained to review the marketability of title and all Closing documents including the Greater Lansing Association of REALTORS® Closing Agreements form in order to determine that the terms of this Contract have been met.

\* \* \*

BUYER acknowledges that it has been recommended that a licensed contractor(s) and/or inspector(s) of BUYER'S choice be retained to inspect the property. Contrary to Broker's recommendation, BUYER DOES NOT DESIRE TO OBTAIN AN INSPECTION OF THE PROPERTY. BUYER IS NOT RELYING ON ANY REPRESENTATION OR STATEMENT MADE BY SELLER OR ANY REAL ESTATE SALESPERSON/BROKER REGARDING ANY ASPECT OF THE PROPERTY OR THIS SALE, EXCEPT AS MAY BE EXPRESSLY SET FORTH IN THIS CONTRACT, A WRITTEN AMENDMENT TO THIS CONTRACT OR ANY WRITTEN DISCLOSURE STATEMENT.

Despite the recommendations in the buy and sell agreement, plaintiff never had the property inspected, nor did plaintiff retained a lawyer to review the title documents prior to closing. Shortly after closing, plaintiff hired contractors to build a large pond on an area in the middle of the property in front of the house. During the excavation, the excavator hit a large underground drain that was about fifteen inches in diameter and ran through the middle of the property. According to plaintiff, despite his expenditure of large sums of money to fix the drain and fill in the land, the property floods each time it rains.

Plaintiff filed his original complaint against the Theisens, Key, and Remax in the Clinton Circuit Court. Plaintiff alleged three counts against defendants: misrepresentation, breach of contract, and violation of the Consumer Protection Act. Plaintiff, after retaining new counsel, filed an amended complaint adding the title insurer, Landamerica Transnation Title Company (Landamerica), as a defendant on each count.<sup>1</sup> The Theisens' moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), and Key and Remax subsequently moved for

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<sup>1</sup> Landamerica was named as a defendant in plaintiff's amended complaint; however, plaintiff subsequently dismissed Landamerica from this lawsuit before the court heard Landamerica's motion for summary disposition.

summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). The trial court granted their motions pursuant to MCR 2.116(C)(10) only.

## II

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Rose v Nat'l Auction Group, Inc.*, 466 Mich 453, 461; 646 NW2d 455 (2002). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. Summary disposition is appropriate if, after reviewing the evidence in a light most favorable to the nonmoving party, the trial court determines that no genuine issue concerning a material fact exists and the moving party is entitled to judgment as a matter of law. *Id.*

## III

The trial court did not err in granting summary disposition in favor of defendants and in dismissing plaintiff's claims. The fact that plaintiff received actual notice of a drain easement on his property in the revised title commitment defeats any reasonable reliance defendant may have had on the Seller's Disclosure Statement. Plaintiff's breach of contract claim is nothing more than a restatement of his misrepresentation claim, and in any event, fails because plaintiff took the property "as is." Lastly, plaintiff's consumer protection claim is abandoned on appeal for failure to brief it.

The elements of fraudulent representation are: (i) the defendant made a material representation; (ii) the representation was false; (iii) when making the representation, the defendant knew or should have known that it was false; (iv) the defendant made the representation with the intention that the plaintiff would act on it; and (v) the plaintiff acted on it and suffered damages as a result. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999). The plaintiff's reliance upon the representation must have been reasonable. *Id.* at 690.

In this case, plaintiff's reliance upon the representation in the seller's disclosure statement was unreasonable. First, the seller's disclosure statement is simply a representation to plaintiff that the Theisens were unaware of any easements on the property. Plaintiff presented no evidence to show that the Theisens knew this representation was false when they made it. In any event, plaintiff was provided with a revised title commitment from his title insurer that disclosed the existence of a drain easement on the property prior to the closing. Thus, plaintiff was in possession of such facts as would lead a reasonable person to make further inquiries into the extent of the easement. See *Lakeside Associates v Toski Sands*, 131 Mich App 292, 298; 346 NW2d 92 (1983). Having actual notice of the easement, plaintiff cannot maintain that defendants' alleged misrepresentation was the proximate cause of his damages.

With regard to plaintiff's breach of contract claim, it is clear that it is nothing more than a restatement of his misrepresentation claim. The essence of plaintiff's breach of contract claim is stated in Count II of his complaint as follows:

23. Plaintiff contracted to purchase the property from the Theisen defendants in their Seller's Disclosure Statement.

24. The property was not conveyed in the condition as represented and promised by defendants.

This Court is not bound by plaintiff's choice of labels for his action because this would exalt form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). In any event, plaintiff bought the property "AS IS." The buy and sell agreement contains no covenants that there are no easements on the property. The Seller's Disclosure Statement merely states that the Theisens were not aware of any easements on the property when they completed the form, and plaintiff has not submitted any evidence to suggest otherwise.

Although plaintiff raised the issue of a violation of the Consumer Protection Act, MCL 445.901, *et seq.*, in his complaint, plaintiff did not brief this issue on appeal. Failure to brief an issue abandons it on appeal. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claim nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citation omitted).

Finally, plaintiff argues for the first time on appeal that he did not have an opportunity to amend his complaint to add a claim under the Seller's Disclosure Act, MCL 565.955, *et seq.* Plaintiff, however, never sought leave to amend his complaint from the trial court. An issue must be raised, addressed, and decided to be preserved for appellate review. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 533; 672 NW2d 181 (2003). Because this issue was not raised before or presented to the trial court, it is not properly preserved for appellate review, and we, therefore, decline to address it. *Harbour v Correctional Medical Services, Inc.*, 266 Mich App 452, 468-469; 702 NW2d 671 (2005).

Affirmed.

/s/ David H. Sawyer  
/s/ Michael J. Talbot  
/s/ Stephen L. Borrello